

Re: Should Parliament confirm the Declaration of a Public Order Emergency throughout Canada under the *Emergencies Act*?

This memorandum concerns whether the Government of Canada has justifiably declared a “public order emergency exists throughout Canada” under the *Emergencies Act* (“**Act**”),¹ pursuant to the declaration of February 14, 2022 (“**Declaration**”).² This memorandum identifies critical questions for which parliamentarians should seek responses from the Minister of Public Safety (“**Minister**”) and the federal Cabinet (“**Cabinet**”) when deliberating whether to confirm the Declaration.

To inform this analysis, this memorandum considers the “Explanation pursuant to subsection 58(1) of the *Emergencies Act*” (“**Section 58 Explanation**”) tabled by the Minister in the House of Commons on February 16, 2022,³ as well as making reference to the following instruments published in the Canada Gazette Part II on February 15, 2022 (together, the “Additional Measures”):

- the “**Emergency Measures Regulations**”,⁴ and
- the “**Emergency Economic Measures Order**”.⁵

This memorandum proceeds by considering the following questions:

1. What legal thresholds are required for Cabinet to declare a “public order emergency” under the Act?
2. Does the Section 58 Explanation identify a national emergency that exceeded the capacity or authority of a province?
3. Does the Section 58 Explanation identify a national emergency that cannot be effectively dealt with under any other law of Canada?
4. Do the Declaration or Additional Measures confer jurisdiction for enforcement that the federal government lacked prior to the Declaration?
5. Are the prohibitions promulgated under the Emergency Measures Regulations reasonably required to effectively deal with the public order emergency?
6. Are the duties imposed under the Emergency Economic Measures Order reasonably required to effectively deal with the public order emergency and do these comply with section 8 of the Canadian Charter of Rights and Freedoms?

For each question, this memorandum identifies potential inconsistencies in the Section 58 Explanation and recommends specific questions for which parliamentarians should seek a response from the Minister to ensure that Cabinet has reasonable justification and before confirming the Declaration.

¹ *Emergencies Act*, RSC 1985, c 22 (4th Supp).

² *Special Temporary Measures for Public Order Emergency*, Order-in-Council PC 2022-0106 (14 Feb 2022). Available online: <https://orders-in-council.canada.ca/attachment.php?attach=41560&lang=en>

³ “February 14, 2022 Declaration of Public Order Emergency: Explanation pursuant to subsection 58(1) of the *Emergencies Act*”. Accessed at: <https://jessupmoot.ca/wp-content/uploads/2022/02/Section-58-explanation-FINAL-CLEAN.pdf>

⁴ *Emergency Measures Regulations*, SOR/2022-21 (15 Feb 2022). Available online: <https://www.gazette.gc.ca/rp-pr/p2/2022/2022-02-15-x1/html/sor-dors21-eng.html>

⁵ *Emergency Economic Measures Order*, SOR/2022-22 (15 Feb 2022). Available online: <https://www.gazette.gc.ca/rp-pr/p2/2022/2022-02-15-x1/html/sor-dors22-eng.html>

1. What legal thresholds are required for Cabinet to declare a “public order emergency” under the Act?

Section 16 of the Act defines a “public order emergency” as “an emergency that arises from threats to the security of Canada and that is so serious as to be a national emergency.”

In turn, “threats to the security of Canada” is, by reference, defined by section 2 of the *Canadian Security Intelligence Service Act* (“**CSIS Act**”),⁶ under which:

threats to the security of Canada means

- (a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,
- (b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,
- (c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and
- (d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,

but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d).

Section 3 of the Act provides a threshold for the declaration of a national emergency, as follows:

For the purposes of this Act, a **national emergency** is an urgent and critical situation of a temporary nature that

- (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
- (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, security and territorial integrity of Canada

and that cannot be effectively dealt with under any other law of Canada.

Under subsection 17(1) of the Act, Cabinet can declare a public order emergency “[w]hen the Governor in Council believes, on reasonable grounds, that a public order emergency exists and necessitates the taking of special temporary measures for dealing with the emergency”.

⁶ Canadian Security Intelligence Service Act, RSC 1985, c C-23, s.2.

Paragraph 17(2)(c) also contemplates that a declaration of public order emergency may be geographically limited. That is, the paragraph expressly providing for the declaration to specify “if the effects of the emergency do not extend to the whole of Canada, the area of Canada to which the effects of the emergency extend.”

The thresholds in the Act give rise to the following questions:

- What is the basis for Cabinet’s reasonable belief that the national emergency exceeded the capacity or authority of a province?
- What is the basis for Cabinet’s reasonable belief that the national emergency could not be effectively dealt with under any other law of Canada?
- What is the basis of Cabinet’s reasonable belief that the emergency “exists throughout Canada” rather than in a specific area or specific areas?
- Why do municipal, provincial and federal law enforcement agencies lack the capacity or authority to deal with the threat?
- Why are existing provisions of Criminal Code and other federal laws insufficient to effectively deal with “the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective”?

2. Does the Section 58 Explanation identify a national emergency that exceeded the capacity or authority of a province?

The Section 58 Explanation identifies the following potential bases for Cabinet’s belief that the emergency exceeds the capacity or authority of a province:

- Evidence of coordination between the various convoys and blockades (at p.5);
- Local tow truck drivers’ refusal to remove trucks in the blockade (at p.5);
- Inability of Ontario’s government to compel tow truck drivers to clear vehicles under the *Emergency Management and Civil Protection Act* (“**EMCPA**”)⁷ (at p.9);
- Provincial governments could only cancel or suspend insurance policies of blockading vehicles for those vehicles registered in the particular province (at p.10);
- Protestors have refused to comply with injunctions covering downtown Ottawa and the Ambassador Bridge (at p.13); and
- The Ottawa Police Service has been unable to enforce the law in the downtown core (at p.13).

Therefore, in order to determine whether any of these circumstances were reasonably believed to exceed the authority of a province, parliamentarians should inquire:

- Did provincial governments and law enforcement agencies have alternatives under other legislation to deal with these circumstances?
- Did provincial law enforcement agencies have recourse to other resources necessary to enforce the law without the Declaration?

⁷ *Emergency Management and Civil Protection Act*, RSO 1990, c E.9.

- Since the Section 58 Explanation only specifically identifies circumstances occurring in the province of Ontario, what is Cabinet’s reasonable belief that the threat exceeds the capacity or authority of all provinces “throughout Canada”?

In addition, in considering the inadequacy of provincial authority and capacity, parliamentarians should consider and ask the Minister to address the following:

- Why could Ontario provincial government not effect removal of obstructing vehicles using other powers under the EMCPA?

For example:

- Subsection 7.0.2(4) of Ontario’s EMCPA provides for orders including:
 - Regulating or prohibiting travel or movement to, from or within any specified area;
 - Using any necessary goods, services and resources within any part of Ontario; and
 - Taking such other actions or implementing such other measures as the Lieutenant Governor in Council considers necessary in order to prevent, respond to or alleviate the effects of the emergency.

- Do Ontario law enforcement agencies lack recourse to any other means of removing obstructing vehicles (e.g., peace officers with operational experience or assistance by drivers of heavy equipment from the Canadian Forces) other than privately-owned “tow trucks”?

For example:

- Ontario’s regulation for *Critical Infrastructure and Highways*,⁸ promulgated under the EMCPA, provides for a police officer to remove any vehicle impeding critical infrastructure if an operator fails to comply with an order; however, the regulation does not otherwise constrain how removal would be effected.
- Section 277 of the *National Defence Act* provides for the Attorney General of a province to requisition aid for the civil power “[w]here a riot or disturbance occurs or is considered as likely to occur”.⁹

- Why does this provincial inability impliedly extend to other provinces where emergency legislation empowers provincial governments to compel services?

For example:

- Emergency legislation in other provinces – specifically, Manitoba, Alberta and British Columbia – include provisions that authorize provincial governments to compel individuals to provide essential services.¹⁰

⁸ *Critical Infrastructure and Highways*, OReg 71/22 (12 Feb 2022), s.5(1)-(4). Available online: <https://www.ontario.ca/laws/regulation/r22071>

⁹ *National Defence Act*, RSC 1985, c N-5, s.277.

¹⁰ See: *The Emergency Measures Act*, CCSM c E80, s.12(1)(c); *Emergency Management Act*, RSA 2000, c E-6.8, s.19(1)(d); and *Emergency Program Act*, RSBC 1996, c 111, s.10(1)(e).

3. Does the Section 58 Explanation identify a national emergency that cannot be effectively dealt with under any other law of Canada?

The Section 58 Explanation identifies the following potential bases for Cabinet's belief that the national emergency could not be effectively dealt with under any other law of Canada:

- The current federal and provincial financial systems are ill-equipped to mitigate the adverse effects of the economic impact without additional measures (at p.9);
- Protestors can move financial resources between financial service providers without regard to their geographic location or whether a provider is provincially- or federally-regulated (at p.9); and
- Reporting on the crowdfunding website, GiveSendGo.com, indicated the majority of donations were made by donors outside of Canada (at p.10).

Additionally, the Declaration specifies that measures necessary for dealing with the emergency include "(iv) measures to authorize the Royal Canadian Mounted Police to enforce municipal and provincial laws by means of incorporation by reference". This implies that the Royal Canadian Mounted Police ("RCMP") lacked authority to enforce such laws prior to the Declaration.

In order to determine whether any other law of Canada cannot deal with these circumstances, parliamentarians should inquire:

- Do other federal laws empower law enforcement, including the RCMP, to use proportionate force under lawful authority or arrest individuals contravening the Criminal Code or other laws?
- Do other federal laws provide for restraint of property (including accounts at federally- or provincially-regulated financial institutions, funds held by crowdfunding platforms and so-called "cryptocurrency") to prevent its use in unlawful conduct?

Notably, the Declaration also specifies that the emergency is constituted of, among other circumstances, "activities that are directed toward or in support of the threat or use of acts of serious violence against persons or property, including critical infrastructure, for the purpose of achieving a political or ideological objective within Canada".

This text effectively mirrors the prong (c) definition of "threats to the security of Canada" under section 2 of the CSIS Act.

To this end, with respect to the jurisdiction of the federal law enforcement, subsection 6(1) of the *Security Offences Act* expressly assigns primary enforcement responsibility the RCMP for an offence that arises from a threat to the security of Canada within the meaning of the CSIS Act.¹¹

¹¹ Security Offences Act, RSC 1985, c S-7, ss.2(a), 6(1).

As well, these specified circumstances in the Declaration align closely (although not completely since omitting the (b)(i)(B) element) with the definition of “terrorist activity” under section 83.01(1) of the Criminal Code.¹² The relevant text defines “terrorist activity” as:

- (b) an act or omission, in or outside Canada,
 - (i) that is committed
 - (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
 - (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and
 - (ii) that intentionally
 - (A) causes death or serious bodily harm to a person by the use of violence,
 - (B) endangers a person’s life,
 - (C) causes a serious risk to the health or safety of the public or any segment of the public,
 - (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
 - (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law. [emphasis added]

Finally, the Criminal Code provides a scheme for restraint of offence-related property by judicial order on reasonable grounds. Specifically, section 2 of the Criminal Code defines “offence-related property” as:

- any property, within or outside Canada,
 - (a) by means or in respect of which an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* is committed,
 - (b) that is used in any manner in connection with the commission of such an offence, or
 - (c) that is intended to be used for committing such an offence

Section 490.8 of the Criminal Code sets out the requirements for an Attorney General to apply for an ex parte order from a judge to restrain such offence-related property. This is to include: the indictable

¹² *Criminal Code*, RSC 1985, c C-46, s.83.01(1).

offence to which the offence-related property relates; the person who is believed to be in possession of the offence-related property; and a description of the offence-related property.

Notably, as reported on February 10, based on an application by Ontario's Attorney General under Section 490.8 of the Criminal Code to prohibit anyone from distributing donations made through the website's "Freedom Convoy 2022" and "Adopt-a-Trucker" campaign pages, the Ontario Superior Court of Justice ordered the restraint of access to millions of dollars donated through online fundraising platform GiveSendGo.¹³

Therefore, in considering the inadequacy of any other law of Canada to effectively deal with the national emergency, parliamentarians should also consider and ask the Minister to address the following:

- Why were the existing provisions of the Criminal Code for restraint of property ineffective to restrain use of property to support unlawful conduct?
- If the government has reasonable grounds to believe that property will be used to support a threat to national security, why has it not used the relevant information to seek an *ex parte* application for an order restraining of that property?
- Why does the RCMP require additional authorization when existing federal laws expressly and unambiguously assign primary enforcement responsibility to the RCMP in respect of the threat to national security that is specified in the Declaration?

4. Do the Declaration or Additional Measures confer jurisdiction for law enforcement that the federal government lacked prior to the Declaration?

As already noted, the Declaration specifies that a measures necessary for dealing with the emergency include "(iv) measures to authorize the Royal Canadian Mounted Police to enforce municipal and provincial laws by means of incorporation by reference". Again, this implies that the RCMP lacked authorization to enforce such laws prior to the Declaration.

As above, subsection 6(1) of the *Security Offences Act* expressly assigns primary enforcement responsibility the RCMP for an offence that arises from a threat to the security of Canada. Indeed, the Declaration specifies mirror text to the definition of "threat to the security of Canada" in the CSIS Act that triggers this primary enforcement responsibility for the RCMP.

Additionally, the Declaration (at p.3-4) states that the federal government had received requests for federal support from the City of Ottawa for policing services and from the Province of Ontario with respect to the Ambassador Bridge in Windsor, Ontario.

¹³ As reported by CBC News, "Ontario court freezes access to funds raised for protest convoy on GiveSendGo platform" (10 Feb 2022). Available online: <https://www.cbc.ca/news/canada/toronto/freedom-convoy-2022-donations-frozen-give-send-go-1.6347345>

Of possible relevance, certain caselaw indicates that, as a consequence of the division of powers under the Constitution, the RCMP does not enforce the Criminal Code within provinces unless authorized by the province or a municipality to act as a provincial or municipal police force.¹⁴

Nonetheless, under section 20(1) of the *Royal Canadian Mounted Police Act* (“**RCMP Act**”), the Minister may, with Cabinet’s approval, “enter into an arrangement with the government of any province for the use or employment of the Force, or any portion thereof, in aiding the administration of justice in the province and in carrying into effect the laws in force therein.”¹⁵

Indeed, pursuant to section 20 of the Act, the Declaration cannot modify the division of powers with respect to provincial or municipal control over policing. Specifically, the Act provides:

Control or direction of police force

20 (1) Nothing in a declaration of a public order emergency or in any order or regulation made pursuant thereto shall be construed or applied so as to derogate from, or to authorize the derogation from, the control or direction of the government of a province or a municipality over any police force over which it normally has control or direction.

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(2) Where the Royal Canadian Mounted Police is used or employed in a province or municipality pursuant to an arrangement under section 20 of the Royal Canadian Mounted Police Act, subsection (1) applies in respect of the Royal Canadian Mounted Police, subject to the terms and conditions of the arrangement.

Furthermore, under paragraph 18(a) of the RCMP Act, it is the duty of every officer of the RCMP “to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody”.

Therefore, in considering whether the Declaration or Additional Measures confer jurisdiction for law enforcement that the federal government lacked prior to the Declaration, parliamentarians should also consider and ask the Minister to address the following:

- How can the Declaration confer additional policing powers on the RCMP when the Act expressly preserves provincial and municipal control and direction for policing?
- What additional enforcement authority could the Declaration practically confer when (a) federal assistance had already been requested by Ontario’s government and (b) federal legislation already assigns primary enforcement to the RCMP for the threat specified in the Declaration?

¹⁴ See: *Attorney General of Alberta et al. v. Putnam et al.*, [1981] 2 SCR 267 at 296-7, as well as, more recently, *Public Service Alliance of Canada v. Canada*, 2005 FCA 5 at para. 11, and *Picard v. Canada (Attorney General)*, 2018 FC 747 at para. 26.

¹⁵ *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, s.20(1)

5. Are the prohibitions promulgated under the Emergency Measures Regulations reasonably required to effectively deal with the public order emergency?

The Section 58 Explanation identifies the objective of the prohibitions under the Emergency Measures Regulations as managing the following unlawful conduct:

- Tactics adopted by protestors, including slow roll activity, slowing down traffic and creating traffic jams (at p.5);
- Bringing children to protest sites to limit the level and types of law enforcement intervention (at p.5);
- Impeding the importation and exportation of goods across the Canada-U.S. border (at p.5);
- Disruption of daily life in Ottawa by trucks and personal vehicles in the National Capital Region (at p.5);
- Potential disclosure of police tactics by convoy supporters formerly employed in law enforcement and the military (at p.5);
- Coordination between the various convoys and blockades (at p.5);
- Intentions by ideologically-motivated violent extremism adherents to engage in violence (p.6); and
- Threats of serious violence and terrorism attacks (at p.6).

The Section 58 Explanation indicates that the following prohibitions under the Emergency Measures Regulations address this unlawful conduct:

- Participation in a public assembly (“**prohibited assembly**”) that may reasonably be expected to lead to a breach of the peace by:
 - (a) the serious disruption of the movement of persons or goods or the serious interference with trade,
 - (b) the interference with the functioning of critical infrastructure, or
 - (c) the support of the threat or use of acts of serious violence against persons or property;¹⁶
- causing a person under the age of eighteen years to participate in a prohibited assembly;¹⁷
- travelling to or within an area where prohibited assemblies are taking place, or causing minors to travel to or within 500 metres of a prohibited assembly, subject to certain exceptions;¹⁸ and
- entering Canada as a foreign national with the intent to participate in or facilitate a prohibited assembly.¹⁹

It should be undisputed that all the above conduct identified in Section 58 Explanation would properly be the subject of lawful enforcement and indictment for offences under the Criminal Code, including unlawful assembly (s.63), mischief (s.430(1)) and terrorist activity (s.83.01). As well, section 21 of the Criminal Code includes anyone aiding or abetting the commission of an offence as a party to that offence. Finally, any coordination or facilitation to support the above unlawful conduct should also be subject to the conspiracy offence under section 465 of the Criminal Code.

¹⁶ *Emergency Measures Regulations*, SOR/2022-21 (15 Feb 2022), s.2(1).

¹⁷ *Ibid*, s.2(2).

¹⁸ *Ibid*, s.4.

¹⁹ *Ibid*, s.3.

Given that the conduct identified in the Section 58 Explanation is indictable under the Criminal Code, it is logically unclear how promulgating additional prohibitions is reasonably required to deal with the public order emergency.

Therefore, in considering whether Emergency Measures Regulations are reasonably required to effectively deal with the public order emergency, parliamentarians should also consider and ask the Minister to address the following:

- Why would the Emergency Measures Regulations be reasonably required if the specified unlawful conduct already contravenes the Criminal Code?
- Why does Cabinet believe that enforcement of the Emergency Measures Regulations would be more effective in dealing with the unlawful conduct than enforcement of existing laws, including of indictable offences under the Criminal Code?

6. Are the duties imposed under the Emergency Economic Measures Order reasonably required to effectively deal with the public order emergency and do these comply with section 8 of the Canadian Charter of Rights and Freedoms?

The Section 58 Explanation indicates that the Emergency Economic Measures Order is required because “current federal and provincial financial systems are ill-equipped to mitigate the adverse effects of the economic impact without additional measures” (at p.9).

These measures impose a duty on specified entities providing financial services to:

- Cease dealing or facilitating dealing with any individual or entity contravening the prohibitions in the Emergency Measures Regulations (“**designated person**”);²⁰
- Making available any property, including funds or virtual currency, to or for the benefit of a designated person or to a person acting on behalf of or at the direction of a designated person; or
- Providing any financial or related services to or for the benefit of any designated person or acquire any such services from or for the benefit of any such person or entity.

As effect of these measures, the Section 58 Explanation (at p.10) indicates that:

The emergency measures now require insurance companies to cancel or suspend the insurance of any vehicle or person while that person or vehicle is taking part in a prohibited assembly as defined under the new Emergency Measures Regulations

For scope of these measures, the Section 58 Explanation (at p.9) indicates that:

The *Emergency Economic Measures Order* requires a comprehensive list of financial service providers to determine whether any of the property in their possession or control belong to protesters participating

²⁰ *Emergency Economic Measures Order*, SOR/2022-22 (15 Feb 2022), s.2(1)(a)-(b).

in the illegal blockades and to cease dealing with those protesters. Financial service providers who would otherwise be outside federal jurisdiction are subject to the Order.

Parliamentarians should consider whether these measures are reasonably required to deal with the public order emergency. Additionally, parliamentarians should consider whether these measures infringe the protection against unreasonable search and seizure under section 8 of the Charter of Rights and Freedoms or are a reasonable limit on that right under section 1.

Again, it should be noted that section 490.8 of the Criminal Code provides a judicially-administered scheme for restraints on property following an application by an Attorney General. The scheme requires a judge's determination of reasonable grounds to believe that the property is offence-related property.

Importantly, the Supreme Court of Canada considered the constitutional validity of search and seizure powers under section 8 of the Charter in *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145 [*Hunter*]. Emphasizing that the purpose of the section 8 is to prevent unjustified searches, the Court held that:

It is not enough that a determination be made, after the fact, that the search should not have been conducted. This can only be accomplished by a requirement of prior authorization. Accordingly, prior authorization, where feasible, is a precondition for a valid search and seizure.²¹

Writing for the Court, Justice Dickson further explained:

The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met, in an entirely neutral and impartial manner. ... The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially.²²

On this reasoning, the Supreme Court in *Hunter v. Southam* found that investigatory functions bestowed on the Restrictive Trade Practices Commission under the *Combines Investigation Act* were constitutionally defective because a prosecutor or investigator could not function in a judicial capacity to authorize a search and seizure and the statute lacked any requirement for reasonable and probable grounds.²³

By imposing a duty on financial service providers to cease dealings with any designated person, the Emergency Economic Measures Order circumvents the process under section 490.8 of the Criminal Code that is required for restraining offence-related property.

²¹ *Hunter* at 146.

²² *Hunter* at 161-2.

²³ *Hunter* at 146-7.

Moreover, the Emergency Economic Measures Order contemplates restraining of financial accounts of a designated person whether or not these would constitute offence-related property under the Criminal Code.

Additionally, the Emergency Economic Measures Order imposes certain obligations on for reporting specified transactions by a designated person to the Financial Transactions and Reports Analysis Centre of Canada ("**Centre**").²⁴ These reporting obligations appear to have been drafted to correspond closely to under the existing *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* ("**Money Laundering Act**").

Under section 3 the Emergency Economic Measures Order, the list of specified entities with reporting obligations (as well as facing the above duties to cease dealings with designated persons and continuous determination to that end) closely aligns with the list of entities in section 5 of the Money Laundering Act. The entities identified in paragraphs 3(a)-(j) of the Emergency Economic Measures Order align with those in paragraphs 5(a)-(h.1) of the Money Laundering Act.

However, the Emergency Economic Measures Order also imposes duties and obligations on the additional types of entities specified in paragraphs 3(k)-(l) – specifically:

- (k) entities that provide a platform to raise funds or virtual currency through donations; and
- (l) entities that perform any of the following payment functions:
 - (i) the provision or maintenance of an account that, in relation to an electronic funds transfer, is held on behalf of one or more end users,
 - (ii) the holding of funds on behalf of an end user until they are withdrawn by the end user or transferred to another individual or entity,
 - (iii) the initiation of an electronic funds transfer at the request of an end user,
 - (iv) the authorization of an electronic funds transfer or the transmission, reception or facilitation of an instruction in relation to an electronic funds transfer, or
 - (v) the provision of clearing or settlement services.

Subsection 4(2) of the Emergency Economic Measures Order requires:

- Those entities must also report to the Centre every financial transaction that occurs or that is attempted in the course of their activities and in respect of which there are reasonable grounds to suspect that
- (a) the transaction is related to the commission or the attempted commission of a money laundering offence by a designated person; or
 - (b) the transaction is related to the commission or the attempted commission of a terrorist activity financing offence by a designated person.

With the inclusion of "designated person", this provision otherwise repeats the text of section 7 of the Money Laundering Act, under which entities are required to:

²⁴ *Emergency Economic Measures Order*, s.4(2).

report to the Centre every financial transaction that occurs or that is attempted in the course of their activities and in respect of which there are reasonable grounds to suspect that

- (a) the transaction is related to the commission or the attempted commission of a money laundering offence; or
- (b) the transaction is related to the commission or the attempted commission of a terrorist activity financing offence.

The Money Laundering Act defines “money-laundering offence” and “terrorist activity” by reference to the Criminal Code, with “money-laundering offence” defined as the offence under subsection 462.31(1) under which:

Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that, or being reckless as to whether, all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of a designated offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

The Money Laundering Act defines “terrorist activity” with reference to 83.01(1) of the Criminal Code (as reproduced above).

Parliamentarians should consider whether the likely practical effects of including crowdfunding platforms and payment service providers in the list of financial entities necessitate their inclusion. The following considerations may be relevant:

- Property (e.g., cryptocurrency) held by any such entity could also be subject to a judge’s order on an application under section 490.8 of the Criminal Code.
- Many such entities operate and hold their assets beyond Canada’s borders, and any enforcement against those entities would require foreign recognition of the order.
- Funds held by any such entity would practically need to flow through an entity with existing reporting obligations under the Money Laundering Act (e.g., bank or credit union) before these could be spent in Canada.

Therefore, in considering whether the Emergency Economic Measures Order is reasonably required to effectively deal with the public order emergency and whether those measures comply with the Charter of Rights and Freedoms, parliamentarians should also consider and ask the Minister to address the following:

- Does the Emergency Economic Measures Order meet the procedural requirements for legislatively authorizing search and seizure articulated by the Supreme Court in *Hunter v. Southam*?
- Is the circumvention of the procedure for restraining property under section 490.8 of the Criminal Code necessary to effectively deal with the public order emergency?
- Is the imposition of reporting duties for payment function providers and crowdfunding platforms necessary to effectively deal with the public order emergency?